Supreme Court, U.S.
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No. 89-34

In the Supreme Court of the United States

OCTOBER TERM, 1989

JIMMY BARRIOS-MORIERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the narcotics agent had probable cause to believe that, on the facts of this case, a brick-shaped package wrapped in duct tape contained narcotics.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A16) is reported at 872 F.2d 12.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1989. A petition for rehearing was denied on May 9, 1989. Pet. App. A1-A2. The petition for a writ of certiorari was filed on July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was con-

victed of possessing more than 500 grams of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (1982 & Supp. V 1987). He was sentenced to six years' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed.

1. On the afternoon of July 22, 1987, three law enforcement officers—Drug Enforcement Administration Agent William Dolinsky and New York City Police Department Detectives Thomas Healy and Roy Pena—were conducting surveillance of a parked Audi automobile in the College Point area of Queens, New York, in connection with a recent drug-related homicide. The officers saw a blue Cadillac, driven by petitioner, proceeding down the street where the Audi was parked. The Cadillac " 'slowed down by the Audi, almost came to a stop and it appeared * * * that [petitioner] * * * looked at the Audi for several seconds.' " Pet. App. A4-A5.

Agent Dolinsky radioed Detectives Healy and Pena, he told the detectives what he had seen, and he said that he would follow the Cadillac. Agent Dolinsky then followed the Cadillac for approximately five blocks until it parked across the street from an apartment complex. Petitioner then got out of the car, took a large shopping bag from the trunk, and walked toward one of the apartment buildings. Agent Dolinsky followed petitioner on foot into the apartment building to "see where he was going with the bag." Pet. App. A5. When he entered the apartment building, Agent Dolinsky saw petitioner halfway up a flight of stairs in a common hallway. Dolinsky identified himself as a law enforcement officer and asked to speak with petitioner. Ignoring Dolinsky's request, petitioner continued up the stairs until he reached his apartment. While petitioner was fumbling with his keys, he placed the shopping bag on the floor beside him. *Id.* at A5-A6.

When Agent Dolinsky reached the top of the stairs and was a foot or two from petitioner, he glanced down into the shopping bag and saw a rectangular object approximately eight inches long, four or five inches wide, and four inches deep, that was wrapped in duct tape. Pet. App. A6. Based on his four years' experience as a DEA agent, during which time he had seized hundreds of kilograms of cocaine while working with the New York City Drug Enforcement Task Force, Agent Dolinsky concluded that the package contained cocaine. In his subsequent testimony, he explained that " 'when they are packaged in a kilo form, they are usually wrapped in a masking tape, duct tape[, or] contact paper tape.' " *Ibid.* The agent therefore was " 'fairly confident' " that the package held cocaine. *Ibid.* Agent Dolinsky reached into the bag and retrieved the cocaine. After a further investigation, Dolinsky placed petitioner under arrest. *Ibid.*

2. Before trial, petitioner moved to suppress the cocaine as the product of an unlawful search or seizure. The district court denied the motion, Pet. App. A18, and the court of appeals affirmed by a divided vote. *Id.* at A3-A15. At the outset, the court held that Agent Dolinsky's entry into the apartment building did not constitute a "search," *id.* at A7-A8, and that the agent's subsequent conduct in approaching petitioner in the hallway did not constitute a "seizure." *Id.* at A8-A10. Then, relying on *Texas* v. *Brown*, 460 U.S. 730 (1983), the court ruled that Agent Dolinsky's seizure of the package was supported by probable cause to believe that the package contained cocaine. As the court explained, "[t]he circumstances preceding the officer's ultimate face-to-face encounter with [petitioner] and his viewing of the duct tape wrapped package" provided a sufficient basis from which an experienced narcotics officer could conclude that the package contained narcotics. Pet. App. A13, A15.

Judge Pierce dissented. In his view, the facts known to Agent Dolinsky did not support the conclusion that the package was a kilogram of cocaine. Pet. App. A15-A16.

ARGUMENT

Petitioner renews his claim that the cocaine should have been suppressed as the product of a Fourth Amendment violation.

Petitioner's claim is quite narrow. He does not argue that Agent Dolinsky's entry into the apartment building or his retrieval of the package constituted an unlawful search, nor does he maintain that by approaching petitioner Agent Dolinsky effected an unlawful seizure. Instead, petitioner contends that Agent Dolinsky's seizure of the package was unlawful because the agent did not have probable cause to believe that the package contained cocaine. The courts below correctly rejected that claim, and it does not warrant review by this Court.

It is well settled that a law enforcement officer can seize property in plain view if there is probable cause to believe that the property is a fruit, an instrumentality, or evidence of a crime. *Arizona* v. *Hicks*, 480 U.S. 321, 326-328 (1987); *United States* v. *Jacobsen*, 466 U.S. 109, 121-122 & n.21 (1984) (collecting cases). See *United States* v. *Watson*, 423 U.S. 411 (1976) (the warrantless arrest of a person in a public place is lawful if it is supported by probable cause). Probable cause exists when, in light of the totality of the circumstances, there is a fair probability that a fruit, an instrumentality, or evidence of a crime will be found at a particular location. *Illinois* v. *Gates*, 462 U.S. 213, 238, 243-244 n.13 (1983).

In some cases probable cause to seize a package can be based on its distinctive configuration, because that configuration can suggest to an experienced law enforcement

officer that the package holds contraband. *Texas* v. *Brown*, 460 U.S. at 742-743 (plurality opinion). For instance, in *Texas* v. *Brown* this Court upheld the warrantless seizure of opaque balloons whose ends were tied, on the ground that the investigating officer reasonably believed that balloons were a commonly used means of packaging heroin and that the balloons in that case were being so used. As the plurality explained:

> [Officer] Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, [Officer] Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that [Officer] Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

Id. at 742-743. See also *id.* at 746 (Powell, J., concurring in the judgment) ("Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. * * * [A] law enforcement officer may rely on his training and experience to draw inferences and make deductions * * *.").[1]

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[1] Cf. *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979) ("Not all containers and packages found by police during the course of a search

The court of appeals reasonably applied those principles to the facts of this case. Narcotics agents frequently discover cocaine in packages like the one seized from petitioner.[2] In any event, contrary to petitioner's assertion, the court did not rule that any package wrapped in duct tape may automatically be seized, regardless of the surrounding circumstances, on the ground that it can be deemed to contain cocaine.[3] The court instead relied on the totality of the

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will deserve the full protection of the Fourth Amendment" because "their contents can be inferred from their outward appearance."); *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (plurality opinion) (stating that footnote 13 in *Sanders* describes "little more than another variation of the 'plain view' exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from the searching officer's view").

[2] See, *e.g.*, *United States* v. *Klein*, 860 F.2d 1489, 1492 (9th Cir. 1988) ("A package, wrapped in grey duct tape, was discovered in [defendant's] vehicle. Unwrapped, the package revealed two one-kilogram 'bricks' of cocaine."); *United States* v. *Tormes-Ortiz*, 710 F. Supp. 409, 410 (D.P.R. 1989) (search of defendant's residence uncovered, inter alia, "[t]wo solid, white 'blocks' wrapped with yellow tape"; packages held cocaine); *United States* v. *Amparo*, No. 87 CR. 753 (MJL) (S.D.N.Y. Mar. 3, 1988), slip op. 1 (Westlaw, 1988 WL 25186) (at time of defendant's arrest, "[n]ext to [defendant] was an open plastic bag containing two brick-shaped packages wrapped in tape of the kind usually used to wrap cocaine"); *United States* v. *Puliese*, 671 F. Supp. 1353, 1357 (S.D. Fla. 1987) (search of home revealed "three packages of cocaine, wrapped in tape, and brick-shaped"); *United States* v. *Liberto*, 660 F. Supp. 889, 891 (D.D.C. 1987) ("The officer unfolded one bag, reached inside and removed a package in the shape and the consistency of a brick wrapped in gummed tape. Removal of the tape revealed a white powder, later identified by test as cocaine."), aff'd without opinion, 838 F.2d 571 (D.C. Cir. 1988) (Table).

[3] Accordingly, there is no basis to petitioner's prediction (Pet. 10) that the court of appeals' decision will allow police officers to seize any and all containers in which officers have found narcotics, such as an ordinary paper bag. Not only did the court of appeals rely on facts in addition to the packaging at issue here, but also that packaging itself,

circumstances in ruling that there was probable cause to seize the cocaine. The circumstances included the size and shape of the package, its distinctive wrapping, petitioner's interest in a vehicle under observation in a narcotics-related investigation, petitioner's attempt to avoid speaking with an identified law enforcement officer, and petitioner's apparent nervousness when the agent approached him, all seen through the eyes of an experienced narcotics agent.[4] The court of appeal's probable cause ruling is consistent with this Court's decision in *Texas* v. *Brown*, *supra*, and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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which conformed in size and shape to a brick of cocaine, is far more likely to suggest the nature of its contents than is an ordinary paper bag.

[4] Contrary to petitioner's assertion (Pet. 11), facts that are innocent when considered separately may be indicative of criminal activity when they are considered as a whole. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands. * * * In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Illinois* v. *Gates*, 462 U.S. at 243-244 n.13.